

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

ROBERT LEWIS SIMMONS, JR.,

Plaintiff,

VS.

**BIBB COUNTY LAW ENFORCEMENT
CENTER, SHERIFF JERRY MODENA,
SGT. BOATWRIGHT, PRISON
HEALTH SERVICES, DR. ADCOGA**

Defendants.

CIVIL ACTION NO.5:09-CV-62(HL)

DEFENDANT’S MOTION TO DISMISS

COME NOW, Bibb County Law Enforcement Center, Sheriff Jerry Modena, and Lt. Billy Boatwright, Defendants in the above styled action, by and through their attorney, and file this Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), showing the Court the following:

1.

In relevant part, the Georgia Renewal Statute reads:

[w]hen any case has been commenced in either state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later...

2.

The Georgia Renewal Statute applies only to actions for which service was perfected prior to dismissal, and any claims recited in the “renewed” action must be substantially the same as those claims provided in the original complaint.

3.

Defendant Billy Boatwright was not a named party in the original action and did not receive service of process in that action; therefore, Plaintiff cannot renew an action against him that never existed, and the statute of limitations has elapsed.

4.

Plaintiff's claims under 42 U.S.C. § 1983 are not substantially the same as those alleged in the original suit; therefore, the renewal statute is inapplicable and the statute of limitations has expired.

5.

Plaintiff's claim against Jerry Modena fails to state a claim for which relief may be granted because Jerry Modena is immune from suit individually and in his capacity as Sherriff of Bibb County, Georgia.

6.

Sherriff Modena is immune from suit under § 1983 because the Eleventh Amendment of the U.S. Constitution bars claims against states or "arms of the state" in federal court absent state consent.

WHEREFORE, Defendants Jerry Modena and Billy Boatwright respectfully request that this Court dismiss Plaintiff's claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

*****SIGNATURE PAGE TO FOLLOW*****

RESPECTFULLY SUBMITTED, this 10th day of September, 2009.

S/ O. HALE ALMAND, JR.
Georgia Bar No. 013400

Law Offices of:
ALMAND, WIGGINS & CALHOUN
1922 Forsyth Street
Post Office Box 1605
Macon, Georgia 31202
(478) 746-2237
(478) 746-2434 (facsimile)
ohale@halealmand.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the United States District Court for the Middle District of Georgia, Macon Division, and a copy of same has been mailed to:

Mr. Robert L. Simmons 659992
Valdosta State Prison
Valdosta Annex W-1
P O Box 310
Valdosta, Georgia 31603-0210

S/ O. Hale Almand, Jr.
Attorney for Defendants